IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35558

| STATE OF IDAHO, |) 2009 Unpublished Opinion No. 514 |
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| Plaintiff-Respondent, |) Filed: June 24, 2009 |
| v. |) Stephen W. Kenyon, Clerk |
| TIMOTHY PAUL SEIBERT, |) THIS IS AN UNPUBLISHED |
| Defendant-Appellant. | OPINION AND SHALL NOTBE CITED AS AUTHORITY |
| |) |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order denying motion to dismiss, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rosemary Emory, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Timothy Paul Seibert appeals from the district court's denial of his motion to dismiss this case following his completion of a term of probation on a withheld judgment. We affirm.

Seibert pleaded guilty to felony grand theft, Idaho Code §§ 18-2403, 18-2407(1), and the district court withheld judgment and placed him on probation. One of the terms of Seibert's probation was that he not commit any misdemeanors or felonies while on probation. At the end of his probation, Seibert filed a motion to dismiss the case pursuant to I.C. § 19-2604(1) and also filed an affidavit stating, among other things, that he had followed all the terms of his probation. The State objected to this motion, however, asserting that Seibert had been charged with and pleaded guilty to several crimes while on probation, including misdemeanor driving without a valid license, I.C. § 49-301. The State asserted that Seibert was thus ineligible for dismissal of the withheld judgment. At a hearing on the motion, Seibert's counsel acknowledged that Seibert had in fact pleaded guilty while on probation to misdemeanor driving without a valid license.

The court consequently denied Seibert's motion on the ground that Seibert had not at all times abided by the terms of his probation as required by I.C. § 19-2604(1).

Seibert asserts on appeal that the district erred in denying his motion because "at no time did the State assert that Mr. Seibert had violated the terms of his probation and the State never sought revocation of his probation." We exercise free review over a court's statutory application and construction. *State v. Schumacher*, 131 Idaho 484, 485, 959 P.2d 465, 466 (Ct. App. 1998).

Seibert's motion to dismiss is governed by I.C. § 19-2604(1), which states that a withheld judgment may be dismissed only if the defendant has "at all times complied with the terms and conditions upon which he was placed on probation." Here the probation terms included the requirement that Seibert commit no misdemeanors. It has been clearly held that I.C. § 19-2604 means what it says. "A defendant who has at any time failed to do what he or she was required to do while on probation in a particular case has not at all times complied with the terms and conditions of his or her probation in that case." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (discussing the "at all times" language in I.C. § 19-2604(2)). *See also State v. Thompson*, 140 Idaho 796, 798-99, 102 P.3d 1115, 1117-18 (2004); *State v. Griffith*, 140 Idaho 616, 617, 97 P.3d 483, 484 (Ct. App. 2004); *Schumacher*, 131 Idaho at 487, 959 P.2d at 468. Seibert committed a misdemeanor while on probation, which constituted a violation of his probation conditions. Seibert therefore did not comply with the terms of his probation, and the plain language of I.C. § 19-2604(1) dictates that he was not eligible to have his withheld judgment dismissed, regardless of whether the State asserted a probation violation or sought a probation revocation.

The order of the district court is affirmed.

Judge PERRY and Judge GUTIERREZ CONCUR.